IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 79-1708

STATE OF NEW YORK,
Petitioner,
v.
UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 79-1716

S & E SHIPPING CORP.,
Petitioner,
v.
UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 79-1718

SEAFARERS INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO,
Petitioner,
v.
UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

BRIEF OF RESPONDENT CONAGRA, INC. IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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Respondent ConAgra, Inc. ("ConAgra") submits that the decision of the U.S. Court of Appeals for the Second Circuit as to which review is sought presents no special or important issue that warrants issuance by this Court of the requested *writ of certiorari.*

OPINION BELOW

The opinion of the U.S. Court of Appeals as to which review is sought by petitioners is reported at 600 F.2d 349.

JURISDICTION

The decision and mandate of the U.S. Court of Appeals as to which review is sought was entered on May 7, 1979. Petitions for rehearing were timely filed and rehearing was denied by order of the U.S. Court of Appeals dated January 31, 1980.

The statutory provision pursuant to which each of the petitioners seeks review is 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the opinion of the U.S. Court of Appeals affirming a decision of the Interstate Commerce Commission ("ICC") approving unit-train grain rates presents any special or important issue warranting review by this Court.

STATUTE INVOLVED

The principal statutory provision involved in these proceedings is Section 3(4) of the Interstate Commerce Act [49 U.S.C. § 3(4)] which is set out in Appendix G to the Petition of State of New York. The provisions of Section 3(4) have during the course of the proceedings below been recodified without substantive change at 49 U.S.C. § 10701(c) and 49 U.S.C. § 10742. However, for

purposes of consistency with statutory references in the opinions below, they are referred to herein by their former designation.

STATEMENT OF THE CASE

This proceeding had its inception with the publication in September, 1973 of unit-train rates designed to make available to ConAgra efficient, reliable, uninterrupted, through movement of grain from Twin Ports (i.e., Duluth, MN and Superior, WI) and Twin Cities (i.e., Minneapolis and St. Paul, MN) grain markets to ConAgra's milling facility at Martins Creek, PA. The rates are similar to and based upon those which had previously been made available to ConAgra's competitors at Buffalo, NY. However, the particular rates which are at issue in this proceeding are applicable only to Martins Creek, PA. Since ConAgra alone has facilities at Martins Creek capable of handling grain at Martins Creek in the quantities required to qualify for the rates, only ConAgra can use them.

The rates were vigorously opposed before the ICC by numerous parties, all of whom have subsequently abandoned their opposition.[1] Following lengthy evi-

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[1] None of the petitioners participated in the evidentiary proceedings before the ICC. S&E Shipping Corp. (under its former name of Kinsman Marine) participated in the suspension proceedings which led to the institution of the investigation proceeding which is under review by this Court. However, once the investigation was instituted, S&E advised the Commission that it had no intention of participating directly. Rather, it indicated that its interest would be represented through the Lake Carriers' Association, an organization of which it is apparently a member. By petition for reconsideration filed with the ICC on August 17, 1974, Lake Carriers' Association, speaking on behalf of S&E, advised the ICC that its objections to the unit-train grain rate would be satisfied

dentiary proceedings the lawfulness of the rates was upheld unanimously by a three-member panel of the Interstate Commerce Commission ("ICC"). Thereafter, New York State, an intervenor in the final stages of the ICC proceeding,[2] filed a petition for review with the U.S.

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if that rate were maintained at a level no lower than 88 cents per hundredweight. At the time that the petition of the Lake Carriers' Association was filed the rate in issue was published at a level of 89 cents per hundredweight. Since that time it has been increased periodically to maintain the same relationship with the cost of competitive lake-rail transportation. After the withdrawal of Lake Carriers' Association from the ICC proceedings, S&E reappeared as a petitioner for intervention in the appeal taken by New York to the U.S. Court of Appeals. Seafarers International Union of North America, AFL-CIO did not appear until the case came before the U.S. Court of Appeals for the second time in connection with the Court's review of the decision of the ICC on remand.

[2] At page 5 of its petition New York asserts that its ". . . interest arises from its duty to protect its citizens, water carriers serving its ports and others." However, it requested and was granted leave to intervene in the proceedings below only for the limited purpose of succeeding to the interests of: "the Mayor of the City of Buffalo, the County of Erie, the Niagara Frontier Transportation Authority, an agency of the State of New York, and the Buffalo Area Chamber of Commerce." In petitioning the ICC for intervention New York asserted that: "The limited resources of *those* parties and *their* many responsibilities in the many other matters makes unfeasible *their* further active participation in this proceeding. Therefore, the State of New York, as *parens patria* has undertaken to represent *their* interests, which in this case are the interests of the State as a whole. The intervention of the State of New York will prejudice no one, since the State will not in any way broaden the issues in this proceeding and other petitions for reconsideration will be filed." (Emphasis supplied).

Court of Appeals for the Second Circuit. That petition was the subject of an opinion reported at 568 F.2d 887. In that opinion, which fully details the nature of the proposed rates and the procedural steps which preceded their approval by the ICC, the Court affirmed

> . . . the Commission's order that the proposed rates do not violate § 3(1) of the Act; but, with respect to the § 3(4) claim, we set aside the order and remand the case to the Commission for the limited purpose of determining whether the proposed rates discriminate against the lake carriers as connecting lines.

At page 6 of its petition New York asserts that:

> "The Court of Appeals found that the proposed rates did not violate Section 3(1), but found there was discrimination under Section 3(4)."

Actually, contrary to the representations of New York, the Court of Appeals did *not* make any finding of discrimination under Section 3(4). Rather, it remanded the case to the ICC to make a determination as to whether any such discrimination existed.[3]

Pursuant to the Court's remand the ICC afforded the parties an opportunity to update the record with respect to changed circumstances. After careful consideration of all relevant facts the Commission issued a decision on January 30, 1978 in which it made the following dispositive findings:

> In support of their allegation the unit-train rates to Martins Creek unjustly discriminate against connecting lake carriers at Buffalo, the protestants have shown a difference in ConRail's divisions of

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[3] Indeed, at no point has either the ICC or the U.S. Court of Appeals ever made a finding that the rates violate Section 3(4).

revenue as between the Chicago and Buffalo movements to Martins Creek, which revenue disparity cannot be justified on the basis of relative costs alone. In view of this, it becomes incumbent upon the respondents to justify the difference in rate treatment as between connecting lines by a showing of substantial differences in operating conditions and circumstances attending the two movements. See *Western Pacific R. Co.* v. *United States, supra,* at page 246, where the Supreme Court stated:

> * * * the remedy in § 3(4) situations need not entail the establishment of through routes, joint rates, or indeed any particular form of relief. All that is required is the elimination of discriminatory treatment. * * * Relief is warranted only if it also appears that differential treatment is not justified by differences in operating conditions that substantially affect the alleged discriminating carrier.* * *

In our view the evidence is convincing that the establishment of a new unit-train service over Buffalo would be inefficient, uneconomical, and counter productive and that the existence of such operating deficiencies justify the disparity in rates of divisions as between the connecting lines.

* * * *

The proposed unit-train rates from the Twin Ports and Twin Cities afford ConAgra a constant flow of grain inventory necessary for efficient flour milling at a price competitive with Buffalo millers, which result could not be attained through the availability of unit-train service from Buffalo to Martins Creek. We conclude that the institution of a comparable unit-train service from Buffalo to Martins Creek would be inefficient and uneconomical and that the disparity in rate treatment as between Chicago and Buffalo does not constitute unjust discrimination prohibited under section 3(4) of the act.

The decision of the ICC on remand was again appealed to the U.S. Court of Appeals for the Second Circuit. After full opportunity for briefing and argument the Court issued an opinion (reported at 600 F.2d 349) affirming the ICC decision on remand. Petitioners then filed petitions for rehearing and suggestions for hearing *in banc* were subsequently denied.

ARGUMENT

Petitioners assert several alleged bases for issuance by this Court of a *writ of certiorari*. Each of those reasons is totally lacking in merit.

A. Those Who Are Entitled To Protection Under Section 3(4) Have No Complaint With The Decisions Below.

In considering the contentions of the petitioners, it is important to look to the language of the statutory provision with which they contend that the decisions below are at odds. That provision, Section 3(4) of the Interstate Commerce Act, provides that common carriers by rail must afford equal treatment to their connecting lines. The language of the section goes on to specifically define the class of carriers embraced within the term "connecting line" as follows:

> "As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to Part III."

No connecting line within the terms of that statutory definition or any party properly acting on behalf of any such connecting line has asserted any objection to the rate at issue. Petitioners vigorously but erroneously assert that water carriers engaged in transportation of bulk commodities pursuant to exemptions from the terms of the Interstate Commerce Act are entitled to the pro-

tection of Section 3(4). Such a contention is clearly at odds with the plain language of the statute.

Carriers which hold authority from the ICC are, of course, subject to the protection of Section 3(4) even where they are engaged in transportation which is exempt from ICC jurisdiction. The Commission recognized this in its decision on remand. See *Unit Train Rates on Wheat, Minn. & Wis. to Martins Creek, P.A.*, 356 ICC 82, 91 (1978). However, S&E holds no authority of any kind which would subject it to Part III of the Act with respect to *any* of its operations or activities. Nor, for that matter, has S&E established that it has ever participated in the movement of bulk grain between Twin Ports and Buffalo, although the Commission on remand provided all parties, including S&E, an opportunity to submit supplementary evidence in order to update the record. In the same manner, New York State has failed to identify a single lake carrier who considers itself to be aggrieved by the rate in issue on whose behalf New York State is purporting to act. SIU has similarly failed to identify any vessel operator by whom its members are employed who feels that it has been so aggrieved.

Indeed, the only carriers who did assert an interest in this proceeding appeared through the Lake Carriers' Association and have long since indicated their satisfaction with the non-discriminatory nature of the rate on the basis of its relationship of parity with comparable costs for movement by lake carrier. Thus, in reality, there is no legitimate case or controversy involving parties who have a justiciable interest under the provisions of Section 3(4). Rather, the Court is being called upon to issue an advisory opinion as to the applicability and scope of Section 3(4). The Court should not burden itself with such an undertaking.

B. New York's Concern About Continued Viability of the Lake-Rail Alternative Route Is Entirely Misplaced.

In its petition to the Court, New York suggests that this case is somehow of transcendental importance because the rate in issue threatens the viability of cross-lake transportation of grain and, in turn, the status of Buffalo as a major grain-handling terminal. The record upon which the ICC rendered its decision provides no basis for any such concern. The sensitivity of the ICC to the practical effect of the rate in issue was evidenced by its reopening of the record on remand in order to provide the parties with an opportunity to update the record and present evidence of actual experience under the rate. What that evidence revealed is that the volume of grain moved by lake vessel from Twin Ports to Buffalo actually increased significantly after the rate became effective. See 356 ICC at 85. Also, as the sole user of the rate, ConAgra had assured the Commission of its determination to maintain an equitable allocation of traffic as between both routings. As the Commission observed:

> ConAgra emphasizes in its supplementary statement that it is just as important to ConAgra to have lake carriers available as an alternative to rail transportation. Since the unit train rates to Martins Creek became effective, ConAgra has allocated its wheat traffic to both modes on nearly an equal basis. For example, total unit-train receipts of wheat from January 1975 through May 1977 have been approximately 4.3 million bushels while lake/rail and lake/truck receipts have been 4.5 million bushels. ConAgra sincerely believes that the present situation is one of healthy competitive balance which does not discriminate against any water carrier engaged in lake carriage of grain. (356 ICC at 88)

Thus, the rate here at issue poses no threat to the continued flow of commerce across the Great Lakes and through the Port of Buffalo and no public policy issue of such importance as to warrant the attention of this Court.

C. There Is No Inconsistency Between the Opinions of the Two Panels of the Court of Appeals Who Have Considered This Case.

In its petition, SIU attempts to create a reviewable issue where none actually exists by asserting that the second panel of the U.S. Court of Appeals to consider this case effectively overruled the decision of the first panel. Such a contention is entirely without merit. As has already been noted, neither panel of the Court of Appeals nor anyone else at any time in the course of these proceedings has ever entered a finding that the rate in issue violates Section 3(4).

The first panel of the U.S. Court of Appeals simply held that the Commission committed error in not reaching the issue of whether the proposed rates discriminate against lake carriers as connecting lines in violation of Section 3(4). The Court made no finding as to whether such discrimination existed. On remand, the Commission, in obedience to the Court's mandate, considered the issue and determined that no discrimination existed. When the decision on remand was appealed the second panel of the U.S. Court of Appeals, after carefully reviewing and thoroughly considering the Commission's decision, concluded that it was free of error in its application of the law to the facts before it.

No feature of the decision of the second panel is in any way in conflict with the decision of the first panel.

D. The Decisions Below Do Not Contravene Any Statute or Public Policy and are Entirely Consistent With Decisions of Other Courts of Appeals and Decisions of This Court.

Each of the petitioners cites the principal cases standing for the proposition that a rail carrier cannot refuse to accord equal treatment to all of its connecting lines. We take no issue with that proposition since it is clearly provided for in Section 3(4). However, the arguments of petitioners which are predicated upon that proposition overlook the very fundamental fact that all connecting lines are treated equally at Buffalo. The lowest rail rate applicable on grain moving from Buffalo to Martins Creek is the so-called five-car rate. That rate applies on rail movement from Buffalo to Martins Creek of grain which has arrived at Buffalo by rail, by water, or by any other means of transportation.

The five-car rate is, of course, significantly higher on a prorated per-mile basis than ConRail's division of the unit-train rate which is at the heart of this dispute. Petitioners contend that this fact alone is sufficient to render the unit-train rate unlawful. In essence, they argue that the revenue return realized by ConRail on the five-car rate from Buffalo to Martins Creek provides an absolute and unyielding standard against which all other rates to Martins Creek must be measured for the purpose of determining whether they comport with the requirements of Section 3(4). This is simply not the law.

As the Commission properly concluded, in reliance upon *Western Pacific Railroad Co.* v. *United States*, 263 F. Supp. 140 (N.D.Cal., 1966), any disparity in the revenue realized by ConRail in the two rates can be justified ". . . by differences in operating conditions that substantially affect the alleged discriminating carrier." Here, the differences in conditions are patent and substan-

tial. They were explained in detail by the ICC and need not be repeated. See 356 ICC at 92-93.

What is really at issue here is the right of Conrail to compete with the lake carriers for grain traffic. The case is actually one involving intermodal competition over parallel routes. The meaningless relationship between a five-car rate applicable to all grain traffic moving from Buffalo to Martins Creek and a unit-train rate which does not even traverse Buffalo is little more than a diversion from the real issue of whether the unit train rate improperly undercuts the competitive water-rail rate.

Where such an intermodal comparison is involved Conrail need only establish that the unit-train rate is compensatory. The rate here in issue has been found by the Commission to be fully compensatory and no one has challenged that finding. As this Court stated in *ICC* v. *New York, N.H.&H.R. Co.*, 372 U.S. 744, 759 (1963):

> "If a carrier is prohibited from establishing a reduced rate that is not detrimental to its own revenue requirements merely because the rate will divert traffic from others, then the carrier is thwarted from asserting its own inherent advantages of cost and service. Nor should the selective character of such a rate reduction, made in response to a particular competitive situation, be permitted, without more, to furnish a basis for rejecting the rate."

The Court went on to hold that

> ". . . if a carrier shows a proposed rate to be just and reasonable from the standpoint of its own revenue requirements, it is for a protesting carrier who relies on a claim of inherent cost advantage to bear the burden of persuading the Commission of the existence of that advantage. Of course, when such an issue is raised, each carrier should bring forward the data relating to its own costs that are required for resolution of the issue."

Here, the rail respondents unequivocally established that the rate in issue is just and reasonable from a revenue standpoint. At that point, under the rule enunciated by this Court, the burden shifted to any protesting water carrier who felt that it was injured by the rate to "bring forward the data relating to its own costs." No such carrier presented any such evidence during the extensive evidentiary proceedings before the ICC. Even when the Commission reopened the record on remand, neither S&E nor any other water carrier nor anyone purporting to act on behalf of any other water carrier presented any evidence which would support a conclusion that the lake carriers have any "inherent cost advantage" with respect to the traffic here in issue. Thus, under the standard prescribed by Congress in Section 15a(3) of the Interstate Commerce Act and applied by this Court in *ICC* v. *New York, N.H.&H.R. Co.*, 372 U.S. 744, 759 (1963), the ICC acted with complete propriety in upholding the lawfulness of the rate in issue and the U.S. Court of Appeals acted with equal propriety in affirming that decision.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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